PENDAKWA RAYA

v.

PUN NUAM

HIGH COURT MALAYA, KANGAR
MOHD. SAARI YUSOFF JC
[CRIMINAL TRIAL NO. 47-15-91]
12 APRIL 1992

CRIMINAL PROCEDURE: *Dangerous drugs - Accused charged under s. 39B(1) of Dangerous Drugs Act 1952 (DDA 1952) (Revised 1980) - Accused was caught in an ambush - Denied any knowledge - He alleged the sack containing the drug was carried by a pillion rider - His story disbelieved - Accused failed to rebut the presumptions under ss. 37(d), (da) of Dangerous Drugs Act 1952 - Defence also failed to raise any reasonable doubt as to the guilt of the accused - Failure to call witness not fatal as prosecution was under no duty to call particular number of witnesses - Section 134 of Evidence Act 1950 - Accused found guilty and convicted.*

The accused was charged under s. 39B(1) of the Dangerous Drugs Act 1952 (DDA 1952) for trafficking 19.62 kilogram of raw opium. In his unsworn statement from the dock, the accused alleged that he gave a lift to a person who he said carried the sack which was later found to contain the drug. The Court disbelieved the accused story as being neither reasonable nor inherently credible - it also said that failure of prosecution to call a particular witness was not fatal to prosecution's case as under s. 134 of the Evidence Act 1950, it was not under a duty to call particular number of witnesses. The defence had failed to rebut the presumptions under ss. 37(d), (da) of the DDA on the balance of probabilities. It also had failed to raise any reasonable doubt as to the guilt of the accused. Therefore the accused was found guilty and convicted.

Held:

[1] Based on the evidence, the accused had custody and control of the sack containing the impugned drugs, hence attracting the presumption under s. 37(d) of the DDA 1952.

[2] The accused's unsworn statement from the dock is neither reasonable nor inherently credible whereas the testimonies of the prosecution witnesses were substantially consistent with each other and inherently credible so their evidence was accepted.

[3] The omission to call a prosecution witness is not fatal to the prosecution case as under s. 134 of the Evidence Act 1950, the prosecution was under no duty to call particular number of witnesses (*Ghani bin Jonit v. R* (No. 2)

[4] The defence had failed to rebut the presumptions under ss. 37(d), (da) of the Dangerous Drugs Act 1952 on the balance of probabilities (*PP v. Yuvaraj*). Further, the defence had failed to raise any reasonable doubt as to the guilt of the accused.

[Accused convicted and sentenced to death.]

Cases referred to:
Ghani bin Jonit v. R (No. 2) [1959] 25 MLJ 225 ***(cit)***
A Gabriel & Anor. v. PP [1957] 23 MLJ 83 ***(cit)***
PP v. Yuvaraj [1969] 2 MLJ 91 ***(cit)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(d), (da), 39B(1)(a), (2)
Evidence Act 1950, s. 134

For the prosecution - A.C. Fernandis
For the accused - Manjit Singh; M/s. Manjit Singh & Co.

JUDGMENT

Mohd. Saari Yusoff JC:

The charge against the accused reads as follows:

> Bahawa kamu pada 17 Oktober 1987, pada lebih kurang 9.30 malam di Batu 3, Jalan Tambun Tulang, Simpang Empat, Daerah Kangar, Negeri Perlis telah mengedar dadah berbahaya, iaitu 19.62 kilogram candu mentah dan oleh yang demikian kamu telah melakukan kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 (disemak 1980) dan boleh dihukum di bawah s. 39B(2) Akta yang sama.

The scene of incident in this case was an open area at 3rd m.s. Jalan Simpang Empat Arau, Perlis. Next to the open area was a Shell service station as shown in photographs (P8A & B). There was no street light on the road. On one side of the open area away from the road was an old house as shown at point "E" in sketch plan (P12) and photograph (P8C).

The case for the prosecution was that on 17 October 1987, at about 8.30 p.m., a police party consisting of Insp. Majid (PW3), Insp. Ibrahim (PW5) and three other personnel arrived at the scene and they split themselves into two groups. One group led by PW3 positioned themselves on one side of the open area next to the service station, while the other group led by PW5 positioned themselves on the opposite side. The two groups were about 15 metres apart.

At about 9.30 p.m., PW3 saw a motorcycle from the direction of Simpang Empat going towards Arau. On reaching the scene of incident, the motorcycle crossed the centre white line. At that stage, PW3 saw a lone figure on the motorcycle. Also noticeable was a white plastic sack in front of the rider.

The moment the motorcycle was in the ambush area somewhere in between point "X" and "Y" as shown in sketch plan (P12) PW3 and his men rushed and pounced on the rider (accused). The accused (hereinafter referred to as "T") put up a short struggle but he was overpowered by DPC Baharuddin and DPC Rashid.

Found on the ground near the basket of the motorcycle (in lying position) was a sack containing substance in packages suspected to be raw opium. The Government Chemist (PW1) confirmed that the impugned drugs (P7A - J) was raw opium as defined under DDA 1952. The weight of the impugned drugs was 19.62 kilogrammes.

Based on the evidences as outlined above, I am satisfied that T had custody or control of the sack (P5) containing the impugned drugs, hence attracting the presumption under s. 37(d) DDA 1952. Further, as the impugned drugs was more than 1,000 grammes, presumption under s. 37(da) of the same Act arises. At the close of prosecution's case, I am satisfied that T had a case to answer within the principle as laid down in *Haw Tua Tau's* case.

In an unsworn statement from the dock, T informed the Court that on the date of incident, he went to Simpang Empat to enquire whether there were workers willing to plant paddy on his land. There at Simpang Empat, T stopped at a house of a Chinese. On leaving the house, T gave a lift to a person named Ah Bee. While riding pillion, Ah Bee carried a baggage (barang) on his left thigh.

The crucial part of the defence's case was that at the point when T was turning and proceeding towards the service station to fill petrol, T heard voices saying "Polis, jangan lari". At that stage, Ah Bee instantaneously dropped his baggage (barang) and bolted.

The issue before the Court was, was there a pillion rider with a baggage (barang) on T's motorcycle at the time of incident.

Adverting to the testimony of PW3, his evidence was that while in ambush position at point "X" as shown in sketch plan (P12), he saw a motorcycle with a lone figure on it proceeding from the direction of Simpang Empat towards Arau. Then, he saw the motorcycle crossing the white centre line going towards the open area where PW3 and his men were.

At the stage when the motorcycle was somewhere between point "X" and "Y" as shown in sketch plan (P12), PW3 and his men rushed in, at the same time PW3 yelling "Polis, Polis, jangan lari". DPC Baharuddin grabbed the rider and unseated him. During the struggle, both DPC Baharuddin and DPC Rashid overpowered T. The motorcycle fell and the sack (P5) fell near the basket of the motorcycle.

PW3's evidence was substantially corroborated by that of Insp. Ibrahim (PW5).

Pausing here, as regard the condition of light, there was no street light on the road. However, it could not be said that the area was in total darkness because of light emitting from the service station which, at the time of incident, was lighted (see p. 8B - C and p. 18C - D of Record). Further, the motorcycle's light was on.

According to T's unsworn statement, the pillion dropped the baggage (barang) on T hearing "Polis, jangan lari". Then, PW3 and his men were already rushing in. Had there been a pillion on the motorcycle and fleeing from the scene, it would be inherently incredible for PW3 and PW5 not to notice the pillion. In view of unequivocal evidence of the two witnesses (PW3 and PW5), which evidence I consider as inherently credible, I could not accept the defences's story in that there was a pillion on the motorcycle.

Further, had T's story been true, the scene of struggle and arrest would have taken place somewhere on the tar road. Whereas, in this case, the scene of arrest was somewhere in the open area between point X and Y as shown in sketch plan (P12).

And further, it is observed that the sack (P5) containing the impugned drugs fell beside the motorcycle near the basket. Had it been a case of a pillion dropping the sack from the motorcycle in the manner as described by T, the sack would be lying on the tar road well away from the motorcycle.

From the demonstration in Court, I am satisfied that the whole sack together with the impugned drugs could fit into the basket of the motorcycle.

In the light of analysis as stated above, I disbelieve T's story as being neither reasonable nor inherently credible. However, I find the evidence of PW3 and PW5 to be substantially consistent with each other and inherently credible, hence I accept their evidence. I also accept the unchallenged evidence of PW1, PW6 and other witnesses.

With regard to DPC Baharuddin (arresting officer), he was not called to testify but was offered to the defence. In the light of clear evidence of PW3, PW5 and other witnesses which afforded sufficient proof to support the essential ingredients of the offence, I rule that the omission to call Baharuddin was not fatal to prosecution's case. Moreover, under s. 134 of the Evidence Act 1950, the prosecution was under no duty to call particular number of witnesses (*Ghani bin Jonit v. R (No. 2)* [1959] 25 MLJ 225; *A. Gabriel & Anor. v. PP* [1957] 23 MLJ 83).

Lastly, in considering the totality of evidence taken together with the surrounding circumstances and demeanour of the accused, in my judgment, I find and so hold that the defence had failed to rebut the presumptions under ss. 37(d), 37(da) DDA 1952, on the balance of probabilities (*PP v. Yuvaraj* [1969] 2 MLJ 91). Further, the defence had failed to raise any reasonable doubt as to the guilt of the accused. I find the accused guilty and convict him.

I pass mandatory sentence of death on the accused.

Also found at [1992] 4 CLJ 1872